(1)

Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

RANDY KING,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Respondent

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a denial of a motor vehicle licensee's due process right to require him, upon arrest for Driving Under the Influence of Alcohol, to immediately make an uncounseled decision in the field as to whether or not to submit to a blood alcohol test pursuant to Pennsylvania's Implied Consent Law, on a machine located at the Pennsylvania State Police Barracks, where the licensee is subsequently taken to the barracks, held for the minimum mandatory waiting period as required in the regulations for the administration of the test, and thereupon consents to administration of the test, but is denied same on the grounds that it is "too late", even though the test would have been administered within the three hour window provided by Pennsylvania's Driving Under the Influence of Alcohol Statute, thereby subjecting licensee to a mandatory one year suspension of his operating privileges for this deemed refusal?

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REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

On December 20, 2002, an Order was entered by the Pennsylvania Supreme Court in the case of *Randy King v. Commonwealth Court of Pennsylvania, Department of Transportation, Bureau of Driver Licensing* at Case No. 689 MAL 2002. This unreported Order is reproduced as App. 1a. The Order denied a Petition for Allowance of Appeal of an unreported Memorandum Opinion and Order entered by the Commonwealth Court of Pennsylvania on August 2, 2002 at No. 726 C.D. 2002 (App. 2a), affirming an Order imposed by the Honorable Peter J. O'Brien, Judge of the Court of Common Pleas of Monroe County, Pennsylvania entered on February 25, 2002 (App. 10a)

The Lower Court had held that the Pennsylvania Implied Consent Law did not violate Petitioner's due process rights, reasoning that anything less than a licensee's unqualified, unequivocal assent to submit to chemical testing constitutes a refusal, and holding that a refusal to submit to a breath test is not vitiated by a subsequent consent to take the test, even if this subsequent consent was made within a few minutes of the initial refusal.

JURISDICTIONAL STATEMENT

Petitioner's case was decided by a Final Order without Opinion of the Pennsylvania Supreme Court on December 20, 2002. Jurisdiction is conferred by 28 U.S.C. §1257(a). This Petition for Writ of Certiorari is timely filed because it was mailed within 90 days of December 20, 2002. Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

75 Pa. C.S.A. §1547(b)(1), commonly referred to as the Pennsylvania Implied Consent Law

> If any person placed under arrest for a violation of Section 3731 (relating to Driving Under the Influence of Alcohol or Controlled Substance), is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

75 Pa. C.S.A. §3731

> (a) Offense defined.—
>
> A person shall not drive, operate or be in actual physical control of the movement of any vehicle; 1) while under the influence of alcohol to a degree which renders the person incapable of safe driving; 2) while under the influence of any controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as the Controlled Substance, Drug, Device and Cosmetic Act

to a degree which renders the person incapable of safe driving; 3) while under the combined influence of alcohol and any controlled substance to a degree which renders a person incapable of safe driving; 4) while the amount of alcohol by weight in the blood of: i. an adult is 0.10 percent or greater; or ii. a minor is 0.02 percent or greater.

(a.1) Prima facie evidence.—

(1) It is prima facie evidence that:

(i) an adult had 0.10% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of any vehicle if the amount of alcohol by weight in the blood of the person is equal to or greater than 0.10% at the time a chemical test is performed on a sample of the person's breath, blood or urine; ...

(2) For the purposes of this section, the chemical test of the sample of the person's breath, blood or urine shall be from a sample obtained within three hours after the person drove, operated or was in actual physical control of the vehicle.

STATEMENT OF THE CASE

Petitioner's Pennsylvania Driver's License was suspended on October 8, 2001 for a period of one year as a result of his alleged refusal to submit to chemical testing upon arrest on August 17, 2001, pursuant to Pennsylvania's Implied Consent Law, 75 Pa. C.S.A. §1547(b)(1). Petitioner timely lodged an appeal with the Court of Common Pleas of Monroe County on November 2, 2001. Hearing was held on February 20, 2002 before the Honorable Peter J. O'Brien, Judge, who issued an Opinion and Order on February 25, 2002 denying the appeal (App. 10a). Petitioner timely filed an appeal to the Commonwealth Court of Pennsylvania on March 15, 2002, wherein he raised the constitutional argument that his due process rights had been denied when he was erroneously told that his consent to take the test was "too late". This issue was decided against Petitioner by the Commonwealth Court in an unreported Memorandum Opinion on August 2, 2002 (App. 2a). A timely Petition for Allowance of Appeal, once again raising this issue, was denied by the Pennsylvania Supreme Court on December 20, 2002, without opinion (App. 1a).

The pertinent facts are as follows. On August 17, 2001, Trooper William Long of the Pennsylvania State Police was dispatched to a two-vehicle automobile accident caused by Petitioner. At the scene, the Trooper observed the Petitioner and concluded that Petitioner was intoxicated.

Petitioner was placed under arrest for Driving Under the Influence of Alcohol and seated in the patrol car. The Trooper advised Petitioner of his rights under the Implied Consent Law and requested Petitioner to submit to a breath test on machinery located at the barracks. Petitioner refused and was transported to the Police Barracks. While Petitioner

was in a holding cell, approximately 30 minutes after the arrest, the Petitioner changed his mind and consented to the administration of the breath test. The Trooper indicated that it was now "too late" and subsequently notified the Department of Transportation of the refusal.

REASONS FOR GRANTING THE WRIT

The instant Petition for Writ of Certiorari should be granted because this case presents the important question—Can Pennsylvania validly require an *immediate* unqualified consent to an arresting officer's request for the administration of a breath, blood or urine test without violating Petitioner's due process rights?

Some background is necessary to understand the context in which this issue arises.

Pennsylvania currently has a dual system, encompassing both "criminal" and "civil" ramifications for Driving Under the Influence of Alcohol. Pennsylvania's Driving Under the Influence Statute, 75 Pa. C.S.A. §3731, clearly allows for the use of blood alcohol test results to establish a driver's level of intoxication. Indeed, a level of .10% is a per se offense for adults. 75 Pa. C.S.A. §3731(a)(4). The penalties for a violation of Pennsylvania's Driving Under the Influence Statute are clearly criminal in nature, providing for fines, incarceration and suspension of one's driver's license. At the criminal trial, the prosecutor has an impressive arsenal of evidentiary tools to use against the defendant. Properly obtained chemical testing results for blood alcohol are admissible to establish the Commonwealth's case. Additionally, evidence that a defendant has refused to submit to blood alcohol test at the time of his or her arrest is also admissible pursuant to Pennsylvania's Implied Consent Law, 75 Pa. C.S.A. §1547(e), although "no presumption shall arise from this evidence, but it may be considered along with other factors concerning the charge."

Indeed, it is possible for a Pennsylvania prosecutor to present *dual* evidence of a *refusal*, together with the *results* of medical blood alcohol testing done at a hospital in order to

obtain a conviction. *Commonwealth v. Hipp*, 380 Pa. Superior Ct. 345, 551 A.2d 1086 (1988).

Pennsylvania has consistently held that the license suspension provisions of its Implied Consent Law governing refusal to submit to a chemical blood alcohol test are civil in nature and may be imposed independently of any result in the criminal case. To validly suspend a driver's operating privilege, the Pennsylvania Department of Transportation must prove that:

1. the licensee was arrested for driving while intoxicated and that the arresting officer had reasonable grounds to believe that the licensee was driving while intoxicated;
2. that the licensee was requested to submit to a chemical test;
3. that the licensee refused the test; and
4. that the licensee was warned that refusing the test would result in a suspension.

Postgate v. Department of Transportation, Bureau of Driver Licensing, 781 A.2d 276 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 320 (Pa. 2002).

Because Pennsylvania's Implied Consent Law is civil in nature, the Pennsylvania Supreme Court has promulgated warnings to be administered to a motorist who is requested to submit to a test under the act. *Commonwealth, Dept. of Transportation v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989). The *O'Connell* warnings require a law enforcement officer to inform a motorist arrested for DUI that the rights provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) are inapplicable to a request for chemical testing under Pennsylvania's Implied Consent Law.

Our background discussion concludes with a well-defined statement of the meaning of the phrase "under the influence of alcohol":

"The statutory expression 'under the influence of intoxicating liquor' includes not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile." *Commonwealth v. Griscavage*, 512 Pa. 540, 545, 517 A.2d 1256, 1258 (1986).

To summarize, in the criminal case of DUI, the Commonwealth may use blood alcohol test results, or refusal, or both, to obtain a conviction, which may be predicated on a finding that the defendant, at the time of his operation of a vehicle, due to alcohol consumption was deprived of his clearness of intellect. Yet, the request to submit to a chemical test under the Implied Consent Law, is civil in nature, subject to its own rules and penalties and warnings. Thus, an arrested driver is given his *Miranda* rights, and is immediately told that the *Miranda* rights do not apply to the decision he must make as to whether or not to submit to a chemical test of his blood alcohol level. This is a difficult concept to explain to a sober layperson, let alone one who may be under the influence of alcohol.

We now come to the issue presented by the case at bar.

Pennsylvania Courts have consistently held that anything short of an unqualified, unequivocal assent to submit to chemical testing constitutes a "refusal" warranting a one-year suspension of one's operating privilege. *Mashuda v. Commonwealth Department of Transportation, Bureau of Driver Licensing*, 701 A.2d 301 (Pa. Cmwlth. 1997). Any hesitation on the part of an arrested motorist, despite the inherent confusion associated with informing a motorist of both his *Miranda*

rights and his *O'Connell* warnings, will act as a trigger of the license suspension provisions of the Implied Consent Law. In Pennsylvania, once you say "no", you are stuck, even if you change your mind within a very short period of time. Indeed, the Commonwealth Court's decision in the instant case below cited *Cunningham v. Department of Transportation*, 105 Pa. Commonwealth Ct. 501, 525 A.2d 9 (1987), where it was held that a subsequent request to take a chemical test after an initial refusal does not vitiate the initial refusal, even if the subsequent request was made within a few minutes of the initial refusal. The initial refusal itself is enough to trigger the license suspension provisions, even if the licensee immediately changes his mind and assents to the test. This remains true under the current Pennsylvania Statutory and Case Law scheme despite the fact that the Driving Under the Influence Statute specifically allows for the administration of a blood or breath test within a *three hour window* from the time the licensee was last seen operating or in actual physical control of a motor vehicle, 75 Pa. C.S.A. §3731(a.1)(2), and despite the fact that the Pennsylvania Code requires that an arrested individual must be observed for a period of at least 20 consecutive minutes prior to the administration of the test. See 67 Pa. Code §77.24A. This is an absurd result.

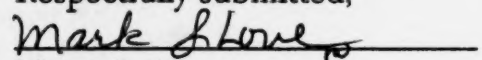
Your Honorable Court has held that suspension of issued driver's licenses involves State action that adjudicates important interests of licensees and thus licenses may not be taken away without procedural due process. *Bell v. Burson*, 402 U.S. 535, 92 S.Ct. 1586 (1971). Maintaining one's issued driver's license is an entitlement, and relevant constitutional restraints limit state power to terminate an entitlement whether that entitlement is denominated a right or a privilege. *Bell* at page 539. Because Pennsylvania's Implied Consent Law involves the deprivation of a legally cognizable

entitlement, it stands to reason that procedural due process requires an individual be granted at least some meaningful opportunity to make an informed and reasoned decision regarding his consent to the test and any requirement for an uncounseled split second decision on the part of the individual cannot satisfy the due process requirement as outlined in *Bell v. Burson*, especially where the underlying criminal statute allows the State to use the results of such a test administered within three hours after the person drove.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to the Pennsylvania Supreme Court to review the Order of that Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am, this 14th day of March, 2003, serving by first class mail, postage prepaid, a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania of Randy King, Petitioner, upon the person listed below:

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APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 689 MAL 2002
Petition for Allowance of Appeal from the Order of the Commonwealth Court

RANDY KING,

Petitioner

v.

COMMONWEALTH COURT OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING,

Respondent

ORDER

PER CURIAM

AND NOW, this 20th day of December 2002, the Petition for Allowance of Appeal is hereby DENIED.

It is further ordered that the Application for Stay is hereby DENIED.

TRUE & CORRECT COPY
ATTEST: DEC 20 2002
/s/IRENE M. BIZZOSO, ESQUIRE
DEPUTY PROTHONOTARY

APPENDIX "B"
IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 726 C.D. 2002
Submitted: July 12, 2002
Randy King,

Appellant

v.

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED
MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: August 2, 2002

Randy King, (Licensee) appeals from an order of the Court of Common Pleas of Monroe County (trial court), denying his appeal and reinstating the one-year suspension of his operating privilege imposed by the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (DOT) as a result of his refusal to submit to chemical testing pursuant to Section 1547(b)(1) of the Vehicle Code (Code), 75 Pa. C.S. § 1547(b)(1).[1] We affirm.

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[1] Section 1547(b)(1) of the Code, commonly referred to as the Implied Consent Law, provides as follows:

> If any person placed under arrest for a violation of section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

75 Pa. C.S. §1547(b)(1).

On August 17, 2001, Trooper William Long of the Pennsylvania State Police was dispatched to a two vehicle automobile accident in Polk Township, Monroe County, Pennsylvania. Upon conducting an accident investigation, Trooper Long learned that Licensee's vehicle struck the rear of another vehicle which was stopped at a traffic light. Trooper Long proceeded to interview Licensee. During this interview, Trooper Long observed Licensee and detected a strong odor of alcohol surrounding him. Trooper Long also noted that Licensee's speech was slowed, slurred and somewhat incoherent. Upon questioning, Licensee admitted having two beers earlier that evening. Trooper Long then asked Licensee to perform some field sobriety tests, but Licensee refused.

At that point, Trooper Long placed Licensee under arrest for driving under the influence of alcohol and seated him in the back of his patrol car. While Licensee was seated in the rear of the car, Trooper Long read him the Miranda warnings, the Implied Consent warnings and the O'Connell warnings. Trooper Long read these warnings from a form and noted on said form the time that each warning was read. Trooper Long then asked Licensee to submit to a breath test. Licensee, however, refused and was transported back to the police barracks. Approximately thirty to forty minutes after this request, while Licensee was in a holding cell and Trooper Long was typing charges, Licensee asked to take the breath test. Trooper Long indicated that it was now too late. Trooper Long thereafter notified DOT of Licensee's refusal.

By letter dated October 8, 2001, DOT informed Licensee that it was suspending his operating privilege for a period of one year as a result of his refusal to submit to chemical testing on August 17, 2001. Licensee filed a statutory appeal with the trial court. A hearing de novo was scheduled and held before the trial court on February 20, 2002. At this hearing,

DOT presented the testimony of Trooper Long. Trooper Long testified to the facts surrounding the accident and his subsequent investigation and arrest of Licensee as described above.

Trooper Long then described his reading of the chemical test warnings to Licensee and his request to Licensee to submit to a breath test.[2] Trooper Long indicated that Licensee refused to take the test, that he simply "did not want to take the test." (R.R. at 15a). Later, while at the barracks, Trooper Long indicated that Licensee told him that the reason he refused the test was because he felt "[he] would fail." *Id.* Trooper Long indicated that he advised Licensee that everything was explained to him, i.e., there were "certain consequences for [refusing to take the test]." *Id.* Licensee responded by asking if he could "take it now?" and Trooper Long responded "[n]o, it's too late." (R.R. at 15a-16a). Trooper Long indicated that, by this time, approximately thirty to forty minutes had elapsed since he initially requested that Licensee take a breath test.

On cross-examination, counsel for Licensee presented Trooper Long with a copy of his Affidavit of Probable Cause.[3] In this Affidavit, Trooper Long states that he was dispatched to the scene of a two vehicle accident on August 17, 2001, at 9:40 p.m. *See* R.R. at 21a. The time stated in this Affidavit was not consistent with Trooper Long's prior testimony and the form submitted by DOT, which indicated that Trooper Long read the necessary warnings to Licensee at or about 9:10 p.m. that evening. Upon questioning, Trooper Long tes-

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[2] A copy of the form Trooper Long read to Licensee with the aforementioned warnings, including notations made by Trooper Long as to the times the warning were read, was later admitted into evidence without objection. The form, as well as Trooper Long's own testimony, indicates that he read Licensee the Miranda warnings at 9:10 p.m., the Implied Consent warnings at 9:12 p.m. and the O'Connell warnings at 9:14 p.m.

[3] This Affidavit was also later submitted into evidence without objection.

tified that he read the aforementioned warnings and noted the times "[a]t the scene" of the accident. (R.R. at 18a). As to the time discrepancy with his Affidavit, Trooper Long noted that he didn't "have the dispatch log in front of [him]" and that [i]t could very well be a typo on [his] Affidavit of Probable Cause." *Id.* DOT then rested, as did Licensee.[4]

The trial court thereafter entered an order denying Licensee's appeal and reinstating the suspension of his operating privilege. Licensee filed a notice of appeal with the trial court. Licensee then filed a statement of issues on appeal. The trial court followed with an opinion in support of its order. In its opinion, the trial court specifically found Trooper Long's testimony to be credible. Based upon this testimony, the trial court concluded that Trooper Long advised Licensee of the necessary warnings, but that Licensee made a knowing and conscious refusal to submit to chemical testing.

On appeal to this Court,[5] Licensee argues that the trial court erred in concluding that DOT met its burden in this case. More specifically, Licensee argues that, based upon the inconsistency between Trooper Long's testimony and his Affidavit of Probable Cause regarding the time of his dispatch to the accident and his reading of the appropriate warnings, the trial court's finding that proper warnings were adminis-

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[4] In summation, "Licensee simply argued that considering the time noted on the Affidavit of Probable Cause, Trooper Long's testimony was "an impossibility and internally inconsistent." (R.R. at 19a).

[5] Our scope of review of the trial court's opinion is limited to determining whether findings of fact are supported by substantial evidence and whether the trial court committed an error of law or an abuse of discretion. *Pappas v. Department of Transportation, Bureau of Driver Licensing*, 669 A.2d 504 (Pa. Cmwlth. 1996). Furthermore, questions of credibility and conflicts in the evidence are for the trial court to resolve. *Id.* If there is sufficient evidence in the record to support the findings of the trial court, we must pay proper deference to the trial court as fact finder and affirm. *Id.*

tered to Licensee was not supported by such evidence. We disagree.

To suspend a licensee's operating privilege under Section 1547(b)(1) of the Code, DOT must prove that (1) the licensee was arrested for driving while intoxicated and that the arresting officer had reasonable grounds to believe that the licensee was driving while intoxicated; (2) that the licensee was requested to submit to a chemical test; (3) that the licensee refused the test; and (4) that the licensee was warned that refusing the test would result in a suspension. *Postgate v. Department of Transportation, Bureau of Driver Licensing*, 781 A.2d 276 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, ___ Pa. ___, 796 A.2d 320 (2002).

Once DOT has proven that the licensee failed to submit to the chemical test, the burden then shifts to the licensee to prove by competent evidence that he/she was physically unable to take the test or was not capable of making a knowing and conscious refusal. *See Department of Transportation, Bureau of Driver Licensing v. Wilhelm*, 626 A.2d 660 (Pa. Cmwlth. 1993).

At the hearing before the trial court, Trooper Long testified that, following his investigation of the accident and arrest of License, he read the aforementioned warnings to him but that he refused to submit to a breath test.[6] Specifically, Trooper Long testified that he read these warnings, as noted on the warnings form, between "2110" and "2114" hours, or between 9:10 p.m. and 9:14 p.m. (R.R. at 14a, 18a, 20a).[7] Admittedly Trooper Long's Affidavit of Probable Cause indicated that he was dispatched to the scene of the accident at "2140 hrs" or 9:40 p.m. in the evening of August 17, 2001,

[6] Licensee never presented any evidence, nor did he ever argue, that he was physically unable to take the test.

[7] Moreover, as noted above, Trooper Long specifically testified that he read these warnings to Licensee "at the scene" of the accident. (R.R. at 18a).

which conflicts with the above times. (R.R. at 21a). Nevertheless, when questioned regarding this inconsistency, Trooper Long specifically indicated that the same "could very well" have been the result of a typographical error on his Affidavit of Probable Cause.

The trial court credited the entire testimony of Trooper Long. This testimony constitutes substantial evidence in support of the trial court's finding that Trooper Long administered proper warnings to Licensee. Thus, we cannot say that the trial court erred in concluding that DOT met its burden in this case.

Next, Claimant argues that the trial court erred in failing to find that Trooper Long violated his due process rights by refusing to allow him to take the breath test when he requested to do so at the barracks. Again, we disagree.

The law is well settled that anything less than a licensee's unqualified, unequivocal assent to submit to chemical testing constitutes a refusal. *See Finney v. Department of Transportation, Bureau of Driver Licensing*, 721 A.2d 420 (Pa. Cmwlth. 1998); *Cunningham v. Department of Transportation*, 525 A.2d 9 (Pa. Cmwlth. 1987). Moreover, we have previously held that a refusal to take the test is not vitiated by a subsequent request to take the test, even if this subsequent request was made within a few minutes of the refusal. *See Cunningham* (licensee's request to take the test made only five minutes after initial refusal); *Appeal of Miller*, 470 A.2d 213 (Pa. Cmwlth. 1984) (licensee's request to take the test made only fifteen to twenty minutes after two separate refusals).[8]

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[8] In *Appeal of Miller*, we specifically held that a licensee's refusal to take a breathalyzer test "mandates suspension of his operator's license under the Code." *Appeal of Miller*, 470 A.2d at 213. Explaining the rationale underlying this holding, we explained that "police officers are not required to spend effort either cajoling the defendant or spend time waiting to see if the defendant will ultimately change his mind." *Appeal of Miller*, 470 A.2d at 214.

Here, there is no question that Licensee initially refused to submit to a breath test. Trooper Long credibly testified to as much before the trial court.[9] Trooper Long also testified that it was not until thirty to forty minutes later that Licensee asked to take the test. In essence, Licensee is now asking this Court to revisit the well-settled principles of law delineated above. Contrary to Licensee's argument in this case, we do not believe that such principles are "fundamentally unfair"[10] and we decline to revisit these principles under the facts of the present case.

Accordingly, the order of the trial court is affirmed.

/s/JOSEPH F. McCLOSKEY, Senior Judge

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[9] When asked to submit to chemical testing, Trooper Long testified that Licensee indicated that he "would not take the test." (R.R. at 13a). Trooper Long later reiterated that Licensee "just refused" to take the test. (R.R. at 15a).

[10] *See* Brief of Licensee at 12.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 726-C.D. 2002

Randy King,

Appellant

v.

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing

ORDER

AND NOW, this 2nd day of August, 2002, the order of the Court of Common Pleas of Monroe County is hereby affirmed.

/s/JOSEPH F. McCLOSKEY, Senior Judge

APPENDIX "C"

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA
NO. 7903 CIVIL 2001
LICENSE SUSPENSION APPEAL
RANDY KING,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,

Respondent

I. FINDINGS OF FACT

1. In the evening hours of August 17, 2001, the Petitioner was the driver of a motor vehicle involved in an accident with another vehicle on Route 209 in Polk Township, Monroe County, Pennsylvania.

2. When a State Police Officer arrived at the scene to investigate the accident, he met the Petitioner, who was seated in the driver's seat of one of the vehicles, and detected a strong odor of alcohol on his breath. The Petitioner admitted that he had been drinking and refused to perform field sobriety tests requested by the officer. The officer also noticed that the Petitioner's speech was slurred.

4. The State Police Officer placed the Petitioner under arrest for driving under the influence of alcohol and transported him to the State Police Barracks.

5. Although the officer read Miranda Warnings, Implied Consent provisions and O'Connell Warnings from a State Police form to the Petitioner (Respondent's Exhibit 1), the Petitioner refused to submit to a breathalyzer test. Prior to the refusal, the Petitioner was specifically advised that he

would lose his license for a period of one year if he did refuse and that his Miranda Rights did not apply to the chemical testing procedure under the Pennsylvania Implied Consent Law.

II. DISCUSSION

The Pennsylvania Motor Vehicle Code provides in pertinent part as follows:

> (a) General rule.—Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle.:
>
> (1) while under the influence of alcohol or a controlled substance or both; or
>
> (2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.
>
> (b) Suspension for refusal.—
>
> (1) If any person placed under arrest for a violation of section 3731 (relating to driving under influence of alcohol or controlled substance) if requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.
>
> (2) It shall be the duty of the police officer to inform the person that the person's operating privilege will be suspended upon refusal to submit to chemical testing.

(3) Any person whose operating privilege is suspended under the provisions of this section shall have the same right of appeal as provided for in cases of suspension for other reasons. [75 Pa.C.S.A. 1547]

In order to sustain a license suspension under Section 1547(b)(1) of the Code, the Department must prove that the licensee (1) was arrested for driving under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was specifically warned that a refusal to do so would result in a license suspension. *Department of Transportation v. Potter*, 118 Pa. Cmwlth. 524, 545 A.2d 979 (1988). In the case at bar, all of these elements have been proven by the Department of Transportation.

In the case at bar, the Petitioner did not present any evidence to dispute the testimony of the State Police Officer that he was fully advised of his rights before refusing the test. Since we find the testimony of the State Police Officer credible, we must reject the Petitioner's appeal.

III. CONCLUSIONS OF LAW

1. The officer had reasonable grounds to believe that the Petitioner was operating his vehicle while under the influence of alcohol and properly placed him under arrest.

2. The officer provided the Petitioner the proper notice of the provisions of the Implied Consent Law and the fact that the Miranda Rights do not apply to the chemical testing procedure under the Pennsylvania Implied Consent Law.

3. The Petitioner made a knowing and conscious refusal to submit to a breathalyzer test.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

NO. 7903 CIVIL 2001
LICENSE SUSPENSION APPEAL

RANDY KING,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,

Respondent

ORDER

AND NOW, this 25th day of February, 2002, the appeal of Randy King from the Order of the Department of Transportation dated October 8, 2001, suspending his driving privileges for a period of one year, is denied. The supersedeas heretofore granted is terminated.

BY THE COURT:
/s/Peter J. O'Brien, J.

Cc: Mark S. Love, Esquire
Frank M. O'Neill, Esquire
John V. Rovinsky, Esq.

Errata in original.